A

LOY TECK CHYE

v.

ANTAH SEDGWICK CHARTERED INSURANCE BROKERS SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL SUIT NO: D4-22-714-1994]
5 JUNE 2006

C

CONTRACT: *Agreement - Construction of terms - Intention of parties - Ambiguity - Whether resolved in favour of plaintiff - Whether plaintiff entitled to 50% of 'brokerage earned' - Whether plaintiff's claim allowed - Whether defendant's counter claim dismissed*

D

The plaintiff and the defendant entered into a contract ('the agreement') to propose a Professional Indemnity Scheme ('the scheme') to the Malaysian Bar Council (Bar Council) for its members. On 14 August 1989, the Bar Council informed the defendant that they have been appointed the broker for the scheme subject to the approval by the members at a general meeting. The scheme was launched in 1992. Pursuant to cl. 2(a) of the agreement, the plaintiff ought to be paid half of the 20% of the premium collected which represented the brokerage earned by the defendant. However, the defendant did not pay the plaintiff that half share of the brokerage and only paid the plaintiff 5% of 20% which was the amount of RM529,929.93. In 1994, the defendant sent and published letters to members of the Bar Council informing them that the plaintiff was no longer an authorised agent. In addition, the defendant caused to be issued a letter of termination on the basis that the plaintiff was engaged as an agent. It was the plaintiff's case, *inter alia*, that he was entitled to 50% brokerage earned for each and every case, which was 10% of the 20% of premiums collected from the insured and that the purported termination by the defendant was tantamount to a wrongful repudiation of contract by the defendant. Hence, the plaintiff prayed for damages. The defendant denied plaintiff's claims and maintained that the plaintiff was employed as an agent of the defendant and that the defendant had made payment to the plaintiff in accordance with the formula. The defendant further filed a counterclaim claiming *inter alia* a declaration that the plaintiff was at all material times acting as an agent of the defendant pursuant to the agency contract between the defendant and the

E

F

G

H

I

plaintiff and that the plaintiff's appointment as an agent of the defendant company had been terminated. The issues were: (1) what was the brokerage the plaintiff was entitled to and (2) whether the termination by the defendant effective on 20 May 1994 valid.

Held (allowing plaintiff's claim and dismissing defendant's counter claim):

(1) That the plaintiff had played his role was acknowledged by the defendant. The scheme for the Bar Council involved an area in which the defendant had not shown it had experience of its own and thus required the local expertise and input provided by the plaintiff.. The plaintiff was entitled under para. 2 to 50% of the 'brokerage earned'.This was not the same as brokerage earned by the defendant alone, but the brokerage earned by the plaintiff and the defendant working together under the agreement. Since what was earned was 20%, the plaintiff ought on the face of it be entitled to half of it. (paras 23, 25 & 26)

(1a) Both Sedgwick UK and the plaintiff were brought into the transaction by the defendant, who was the only party licensed as a broker. Commissions on reinsurance was an area where Sedgwick UK providing the foreign work could be amply compensated for its efforts even if it collected no share of brokerage commission from the defendant. The brokerage earned from the scheme was a cake for the defendant to cut. But after having cut out the half share for the plaintiff under the agreement without specifying that a half share of the brokerage earned was first to be taken out to pay Sedgwick UK, the defendant could only afterwards cut out a share to Sedgwick UK out of the remaining half, and could not say there was a half of the plaintiff's slice that must also be shared with Sedgwick UK. The agreement was clear. Even if matters outside of the agreement were taken into consideration in order to say that as a result there was 'ambiguity' in the agreement, it must be borne in mind that since the agreement was drafted by the defendant, any ambiguity was to be resolved in favour of the other party, in this case, the plaintiff. The agreement expressed clearly the intention of the parties thereto, as drafted by the defendant, that the plaintiff be paid half of the brokerage earned by

A that joint enterprise of the proposal to the Bar Council. Since the terms of payment under the agreement were clear, the question whether the plaintiff was an agent or a joint venture partner was irrelevant. (paras 31, 34, 39 & 40)

B **(2)** Since para 6(b) of the agreement provides that 'commission will continue to be payable on risks renewed with the company if the scheme was terminated due to any reasons or whatsoever' the issue of termination was irrelevant. The plaintiff would continue to be entitled to receive his half C share of the brokerage. (para 41)

(3) The plaintiff had between August 1988 to November 1993 received RM529,929.93 and that represented 5% only of the premiums. Since the plaintiff was entitled to 10% of the premiums, the defendant must pay to the plaintiff another D RM529,929.93 for that period. The same percentage of 10% would apply thereafter until 2000 when the scheme was terminated by Malaysian Bar Council. Further, pursuant to para. 6 of the agreement, the plaintiff was entitled to other classes of insurance from members of the Bar Council and E also on risks renewed with the defendant after termination of the scheme. Judgment was entered accordingly. (paras 42, 43 & 44)

Case(s) referred to:

F *Binariang Communications Sdn Bhd v. I & P Inderawasih Jaya Sdn Bhd [2000] 3 CLJ 789 CA* ***(refd)***

Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(refd)***

Ooi Kim Thor v. The Straits Echo Press (1951) Sdn Bhd [1984] 2 CLJ 243; [1984] 2 CLJ (Rep) 302 HC ***(refd)***

G *Syarikat Jaya v. Star Publications (M) Bhd [1990] 1 CLJ 155; [1990] 3 CLJ (Rep) 151 HC* ***(refd)***

Tan Ah Tong v. Perwira Habib Bank Malaysia Bhd [1988] 3 CLJ 833 CA ***(refd)***

H **Legislation referred to:**

Contracts Act 1950, s. 38

Other source(s) referred to:

FMB Reynolds & BJ Davenport, *Bowstead on Agency*, 14th edn, pp 420, 421, 432-434

I *Halsbury's Laws of England*, 4th edn, vol 1(2), pp 127-132

For the plaintiff - Neoh Poh Cheng (Jacqueline Chang with him); M/s Suhaimi Khor Zulkifli & Chang
For the defendant - Lorraine Cheah; M/s Shearn Delamore & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Patail J:

[1] The plaintiff and the defendant entered into a contract dated 22 November 1988 (the agreement) to propose a Professional Indemnity Scheme (the Scheme) to the Malaysian Bar Council (Bar Council) for its members. By a letter dated 14 August 1989, the Bar Council informed the defendant that they have been appointed the broker for the Scheme subject to the approval by the members at a General Meeting. The Scheme was launched on or about January 1992. Between August 1988 to November 1993 the plaintiff was paid RM529,929.93.

[2] Upon this meagre agreed facts, the parties stated that the issues before the court for trial are:

(a) What are the plaintiff's entitlements under the agreement?

(b) Who are the parties entitled to share the "brokerage earned" under cl. 2(a) of the agreement?

(c) What are the premiums paid by the insured from the inception of the Scheme until today?

(d) Was the defendant entitled to terminate the agreement dated 22 November 1988 as at 30 May 1994?

(e) What are the damages suffered by the plaintiff as a result of the termination of the agreement by the defendant on 30 May 1994?

(f) What are the other classes of insurance taken up by members of the Bar Council from the defendant?

(g) Has the plaintiff contributed any monies towards the setting-up and implementation of the Scheme?

A (h) Is the plaintiff an agent of the defendant or is he a joint-venture partner of the defendant?

[3] The following is substantially the summary of the plaintiff's case set out by Messrs Suhaimi Khor Zulkifli & Chang:

B (a) The plaintiff had, since 1977, approached American International Underwriters Limited to formulate a professional indemnity insurance scheme for lawyers.

(b) The formulation of a professional indemnity insurance scheme C involved collection of statistic figures whether members would favour a scheme arranged through the Bar Council. This entailed distribution of questionnaires to members of the Bar Council and collection of data on the set-up and practice of the firms, for example the number of partners, legal assistants D and employees, income, area of practice and other material facts which would be used to calculate the risk to the insurer and to determine the premium.

(c) The plaintiff had, through his years as an insurance personnel, E collected the above information.

(d) On or about 3 August 1988 the then General Manager of the defendant one Encik Harun Fazil suggested to the plaintiff to make use of his knowledge and experience in professional indemnity insurance scheme to jointly present with the F defendant a scheme to the Bar Council with the view of securing the scheme in the name of the defendant with mutual benefit to the defendant and the plaintiff.

(e) A letter dated 3 August 1988 was issued by the defendant to G the Bar Council to confirm that the defendant would present a proposal on a professional indemnity insurance scheme to the Bar Council in conjunction with the plaintiff who was and is at all material times a local specializing intermediary in professional indemnity insurance scheme. Hence a partnership H between the plaintiff and the defendant was formed.

(f) The plaintiff and the defendant entered into the agreement to govern their rights and obligations in this partnership, more particularly the sharing of brokerage earned by the defendant I between them. The plaintiff's entitlement pursuant to this agreement as to the sharing of brokerage earned through the scheme is the crux of the matter in this action.

(g) The plaintiff and the defendant carried on this business relationship in common with a view to profit. The plaintiff contributed his knowledge, experience and good relationship with the Bar Council into this business which saw success in the procurement and implementation of the scheme. The defendant as a company was to provide infrastructure such as finance, office space, administrative and support staff, and a service team in the business relationship.

(h) The plaintiff's entitlements are spelt out in cl. 2 and 6 of the agreement in that the plaintiff is entitled to:

Clause 2

a) 50% brokerage earned for each and every case;

b) 50% of profit commission payable under scheme, based on the formula approved by PIAM under Fire ICA;

Clause 6

c) The above formula will also apply to other classes of insurance secured from the members of the MBC;

d) Commission will continue to be payable on risks renewed with the company if the Scheme is terminated due to any reasons or whatsoever.

(i) In the agreement, the Bar Council is referred to as MBC.

(j) On or about August 1989 members of MBC approved the Scheme in its Annual General Meeting. The defendant was notified *vide* a letter dated 14 August 1989 from the Bar Council.

(k) It is not disputed that between August 1988 to November 1993 the plaintiff received a total of RM529,929.93 from the defendant.

(l) The "brokerage earned" by the defendant under cl. 2(a) of the Agreement is 20% of the premium collected from the insured.

(m) Pursuant to cl. 2(a) of the agreement, the plaintiff ought to be paid, on the face of it, half of the 20% of the premium collected which represents the brokerage earned by the defendant.

(n) However, the defendant did not pay the plaintiff that half share of the brokerage. The defendant only paid the plaintiff 5% of 20% which is RM529,929.93 as stated earlier above.

(o) On or about 1994 the defendant wrote, sent, published and/or caused to be written, sent or published letters to members of the Bar Council informing them that the plaintiff was no longer an authorized agent.

(p) Such publication by the defendant is false in light of the agreement between the plaintiff and the defendant.

(q) In addition, the defendant caused to be issued a letter of termination on the basis that the plaintiff was engaged as an agent.

(r) It is the plaintiff's case that he is entitled to:

(i) 50% brokerage earned for each and every case, which is 10% of the 20% of premiums collected from the insured.

(ii) 50% of profit commission payable under scheme, based on the formula approved by PIAM under Fire ICA.

(iii) 50% brokerage earned on other classes of insurance secured from the members of the Bar Council.

(iv) Commission on the same formula on a continuing basis on risks renewed with the company even if the scheme is terminated due to any reason whatsoever.

(v) The plaintiff must be furnished with information, debit notes, receipts, monthly statements, records of total premiums received from August 1988 for all classes of insurance to enable the amount payable to be determined.

(s) The purportedly termination by the defendant is tantamount to a wrongful repudiation of contract by the defendant. Hence the plaintiff prays for damages.

(t) Furthermore the defendant's publication of the plaintiff is wrongful and malicious and has brought about ridicule, contempt and embarrassment to the plaintiff which the plaintiff also prays for damages.

(u) And last but not least, interest and costs.

[4] The following is substantially the summary of the defence set out by Messrs Shearn Delamore & Co:

(a) On 28 November 1988, the defendant sent a letter to the plaintiff setting out the terms of the contract between the two parties.

(b) A letter dated 14 August 1989 the defendant was informed by the Bar Council that it had been appointed as a broker for the mandatory Scheme, subject to the approval of the Bar Council at a General Meeting.

(c) The practice of paying profit commissions was disapproved of by Bank Negara in or around 1988 and the defendant discontinued such practices at that time.

(d) The Scheme for the Bar Council was launched on or about January 1992.

(e) The plaintiff has admitted receiving the sum of RM529.929.93 from the defendant.

[5] Messrs Shearn Delamore & Co set out the defendant's defence and counter-claim as follows:

(a) The defendant has denied the plaintiff's claim and has maintained that:

(i) The plaintiff was employed as an agent of the defendant;

(ii) The plaintiff is entitled to 50% of the actual brokerage earned by the defendant (which is 10% of the premium paid by the firms insured);

(iii) The defendant has made payment to the plaintiff in accordance with this formula.

(b) The defendant had filed a counter-claim claiming the following reliefs:

(i) A declaration that the plaintiff was at all material times acting as an agent of the defendant pursuant to the agency contract dated 28 November 1988 between the defendant and the plaintiff.

(ii) A declaration that the plaintiff's appointment as an agent of the defendant company had been terminated as at 30 May 1994.

A (iii) An injunction restraining the plaintiff, his servants or agents from representing to third parties or holding himself out as an agent or authorised representative of the defendant.

(iv) Damages for breach of warranty of authority.

B (v) Interest at the rate of 8% per annum on the amount of damages awarded from the date of assessment to the date of full payment.

(vi) Costs.

C (c) The defendant will be submitting that:

(i) The terms of the contractual relationship between the defendant are contained in the Letter of Appointment dated 28 November 1988 and the court can construe the D nature of the relationship and decide if the contract was a contract of agency, with the defendant as the principal and the plaintiff as the agent.

(ii) If the court agrees with the defendant that the plaintiff E had at all material times acted as an agent of the defendant, it can then determine if the defendant had validly terminated the plaintiff's agency as at 30 May 1994.

(iii) If there are any doubts about the accounts of the F defendant in relation to the payment of premiums, these accounts can be considered by the senior assistant registrar of the High Court and any amounts payable can then be assessed.

G (d) The defendants will *inter alia*, rely on the following authorities:

(i) *Binariang Communications Sdn Bhd v. I & P Inderawasih Jaya Sdn Bhd* [2000] 3 CLJ 789

(ii) Contracts Act 1950 (Act 136) pp. 53 to 66

H (iii) *Halsbury's Laws of England*, 4th edn, vol 1(2), pp. 127 to 132

(iv) *Bowstead on Agency*, 14th edn by F.M.B. Reynolds and BJ. Davenport, p 420, 421, 432 to 434

I (v) *Ooi Kim Thor (Trading as Universal Agency Company) v. The Straits Echo Press (1951) Sdn Bhd* [1984] 2 CLJ 243

(vi) *Syarikat Jaya (suing as a firm) v. Star Publications (M) Bhd* [1990] 1 CLJ 155; [1990] 3 CLJ (Rep) 151.

(e) If this Honourable Court is in agreement with the defendant's submission that the plaintiff was at all material times acting as the defendant's agent, and that the plaintiff's agency had been terminated as at 30 May 1995, the court can then also decide on the rate of the commission payable by the defendant to the plaintiff namely:

(i) Whether the rate is 50% of the brokerage actually earned and received by the defendant company for each and every case, or

(ii) Whether the rate is 50% of the brokerage paid for each and every case, regardless of the fact that 50% brokerage fee received for each and every case was paid to Sedgwick UK Limited.

[6] Sedgwick UK Limited, Sedgwick Special Risks Ltd, Sedgwick Associated Risks Limited and Sedgwick Non Marine Ltd, not including the defendant, are referred to generally as Sedgwick UK.

[7] The submission for the defendant after trial is as follows:

(a) The Bar Council had, at various times, looked into the possibility of setting up a professional indemnity scheme for members of the Bar Council but it was only in the late 1980s that the Bar Council seriously considered such a scheme.

(b) Dato' Peter Mooney (the then Vice President of the Bar Council) was appointed as Chairman of the Professional Liability Committee of the Bar Council and was authorised by the Bar Council to look into the setting up of a professional indemnity scheme.

(c) Sometime around 1987/1988 the Bar Council invited two insurance brokers to put up a proposal for consideration by the Bar Council, namely Citicorp and Sedgwick Special Risks Ltd.

(d) Both Sedgwick and Citicorp were invited to appear before the Bar Council to present their proposals. Mr. Harley Lumsden appeared on behalf of Sedgwick.

(e) The defendant had an association with Sedgwick and was interested in participating in a professional indemnity scheme for the Bar Council. Sedgwick had a 40% equity interest in the defendant company. The defendant was required to give Sedgwick a first option if they were involved in work that requires international placement and technical support.

(f) The defendant's presentation to the Bar Council was done by Mr. Harley Lumsden and the written report to the Bar Council was jointly prepared by the defendant and Sedgwick. The plaintiff did not participate in the preparation of the report.

(g) The defendant's Board of Directors were never informed by their former General Manager, Encik Harun Fazil that he intended to enter into an agreement dated 22 November 1988 with the plaintiff and were further never aware that Encik Harun had considered the letter of 22 November 1988 to be a joint-venture agreement.

(h) The plaintiff and the defendant agree that the payment of profit commission was disapproved of by Bank Negara and the practice was discontinued by the insurance industry in Malaysia.

(i) The defendant received a letter dated 14 August 1989 from the Bar Council appointing it as brokers for the mandatory Scheme for the members of the Bar and the defendant were brokers for the Scheme for the years 1991 to 2000.

(j) The defendant has paid a total of RM529.929.93 to the plaintiff.

(k) The defendant had also forwarded a cheque for RM9,683.72 to the plaintiff being the balance sum owed to the plaintiff under the Scheme but the plaintiff has refused to accept this sum.

(l) By a letter dated 29 December 1993 the defendant had written to the plaintiff informing him that his agency with the defendant as set out in the letter dated 22 November 1988 had been terminated, effective 30 May 1994.

(m) Both the plaintiff and the defendant agree that the plaintiff had not made any monetary contribution to the setting up and administration of the defendant's brokerage of the Scheme.

[8] In respect of the plaintiff's statement of claim, it was submitted for the defendant: A

(a) In the plaintiff's statement of claim, he is applying *inter alia*, for a declaration that:

(i) The agreement of 22 November 1988 is valid and enforceable as between the plaintiff and the defendant. B

(ii) On the true construction of the agreement the plaintiff be entitled to receive:

(a) 50% brokerage earned for each and every case; C

(b) 50% of the profit commission payable under the scheme, based on the formula approved by the General Insurance Association of Malaysia under hire inter-company agreement; D

(c) that the plaintiff be entitled to receive such information including debit notes, receipts, monthly statements, records of total premiums received from August 1988 till the date of judgment and continuing, on a monthly basis, or as may be required from time to time by the plaintiff in connection with the computation of this entitlement under cl. 2 and cl. 5 of the agreement; E

(d) the defendant do provide information relating to the status and development of the Scheme on a monthly basis, or as may be required from time to time by the plaintiff in connection with the Scheme; F

(e) the defendant do account all sums received by the defendant and paid by members of the Bar Council in respect of the Scheme and in respect of other classes of insurance as may from time to time be carried out with members of the Bar Council. G

(b) The defendant submitted it is clear from the statement of claim that the plaintiff claims that he entered into a joint-venture with the defendant in respect of the Scheme for the members of the Bar Council. H

(c) It is the defendant's submission that the facts of the case clearly support the defendant's contention that: I

(i) The plaintiff was at all material times acting as an agent of the defendant company and not as a joint-venture partner.

(ii) The plaintiff was at all material times aware of the participation of Sedgwick in the form of their representative, Mr. Harley Lumsden who was primarily responsible for the proposal put forward to the Bar Council and, in the subsequent implementation of the Scheme once it had been accepted by the Bar Council.

(iii) Pursuant to the plaintiff's knowledge of Sedgwick UK's participation, the plaintiff was aware that the agreed commission of "50% of brokerage earned" to be paid to him would be 50% of the brokerage actually earned by the defendant company and would not be the total brokerage collected since 50% of that would be paid to Sedgwick UK.

(iv) The defendant is entitled to terminate the agency of the plaintiff upon giving reasonable notice and this has been done *via* their letter dated 29 December 1993 giving the plaintiff five months notice of the termination of his agency on 30 May 1994.

(d) As to agency it was submitted for the defendant:

(i) The defendant will submit that the court should interpret the terms of the agreement based solely on the words contained in the agreement and not on the evidence of Encik Harun Fazil or the plaintiff.

(ii) In his correspondence with the defendant, the plaintiff has himself used the term "agency contract" to describe his dealings with the defendant.

(iii) That in the report of November 1988 the plaintiff was mentioned in the following context:

> in addition, we will have the services of Loy Teck Chye who has been marketing Professional Indemnity Insurance for the last ten years and has considerable experience in the subject handling this class of insurance in Malaysia on behalf of Lawyers, Architects, Engineers and Surveyors.

(iv) Thus once again, Mr. Loy is not referred to as a partner but is mentioned only as a person who will 'provide services' – very much in the nature of a duty of an agent rather than a partner.

(v) The letter also does not make any reference to the plaintiff sharing any losses that may be suffered by the defendant under the Scheme, a factor which also points against the plaintiff's contention that this was a joint-venture instead of a partnership.

(v) That it is the defendant company who held the broking licence.

(vi) The defendant will also submit that it is interesting to note that their General Manager, Encik Harun saw it fit to give away half their profit on a scheme without first seeking the approval of the Managing Director or the Board of Directors. Encik Harun has admitted that he neither sought their approval nor informed them of his offer to the plaintiff until after the letter of 22 November 1988 was signed. It is also interesting to note that the letter is headed 'Agency Contract' – if Encik Harun drafted the letter himself and was sure that he was entering into a joint-venture with the plaintiff, why was the letter not headed 'joint-venture'?

(e) On the knowledge of the plaintiff of the participation of Sedgwick UK, it was submitted for the defendant that:

(i) The plaintiff has stressed repeatedly that he has the expertise and knowledge in respect of a professional indemnity scheme for members of the Bar. If so, the plaintiff would have been aware that this was the first time a compulsory scheme was being proposed for members of the Bar Council and as such, the expertise, knowledge and financial resources for the Scheme would have to be sourced from outside Malaysia.

(ii) During the cross-examination of PW2, Encik Harun Fazil and of DW2, Puan Arfah Abu Bakar, both witnesses admitted that Sedgwick provided the technical expertise for Antah to bid for and later, administer the Scheme. This was a fact that would have been known to the plaintiff

and to anyone else who participated in the preparation of the report to the Bar Council and also in the administration of the Scheme.

(iii) Puan Arfah Abu Bakar was also asked during cross-examination about Sedgwick informing the defendant about the brokerage fee and produced a letter dated 28 November 1988 addressed by Sedgwick to the defendant where it was suggested that Sedgwick and the defendant share equally a net brokerage of 15%. Puan Arfah explained that later this percentage was increased to 20% with the parties agreeing that each would receive 10% of the total brokerage.

(iv) Puan Arfah Abu Bakar and Encik Harun Fazil have also confirmed during cross-examination that Sedgwick was the party who negotiated the placement of risks overseas. This fact must have been known to anyone (including the plaintiff) who was involved in the administration of the Scheme.

(v) In addition the report dated November 1988 (the same time as when the plaintiff received the letter of appointment dated 22 November 1988) at p. 24 clearly states that:

> This paper has been prepared by Antah Sedgwick Chartered Insurance Brokers Sdn Bhd and by the Professional Indemnity and Financial Institutions Division of Sedgwick Associates Risks Limited in London.

It is evident that he must have assisted Mr. Harley Lumsden and must have known that Sedgwick London would be involved in the Scheme.

(vi) The plaintiff has alleged that he helped prepare the entire report but the evidence of Encik Harun Fazil during his cross-examination contradicts this bare assertion by the plaintiff. Encik Harun stated that Mr. Harley Lumsden of Sedgwick prepared the proposal and 'we gave input to the proposal'. The plaintiff is not even acknowledged as having helped in the preparation of the report and is merely mentioned in one paragraph of the report.

(vii) Dato' Peter Mooney (DW1) has confirmed that Mr. Lumsden was the person who presented the report to the Bar Council at a General Meeting and also confirmed that he hardly knew the plaintiff and was not really aware of his participation in the Scheme. Given that Dato' Mooney was the person entrusted by the Bar Council to look into the implementation of the Scheme, it would seem odd that the plaintiff did not have more interaction with Dato' Mooney with regard to the confirmation of details which are within the knowledge of the Bar Council such as:

(a) the number of lawyers in Malaysia;

(b) the number of partners in each firm;

(c) the number of legal assistants in each firm;

(d) any claims made by members of the public against lawyers for negligence or fraud.

(viii) For this reason it is the defendant's submission that:

(a) The plaintiff was aware that Sedgwick UK would be assisting in the implementation and running of the Scheme at the very latest in August 1988 when he was present at the meeting between Dato' Peter Mooney, Mr. Harley Lumsden and other representatives from the defendant's office.

(b) Bearing the above in mind, the plaintiff must have been aware that the 50% commission payable to him under the letter of 22 November 1988 would be 50% of the commission kept by the defendant as the share of the profit.

(c) As is evident from the evidence of the witnesses the defendant has paid the plaintiff 50% of all the commission kept by them from the time of the Scheme's implementation in 1991 to 30 May 1994 when the plaintiff's agency was terminated. The plaintiff has not denied receiving these monies and has admitted this at para. 8 of his reply and defence to counter-claim.

(d) The payment of the commission to the plaintiff was therefore in accordance with the terms of the letter of appointment of 22 November 1988 as that letter provided for payment of:

(i) 50% of the brokerage earned for each and every case.

(ii) 50% of the profit commission payable under the Scheme, based on the formula approved by PIA under Fire ICA.

(iii) The defendant only earned 10% of the premiums paid under the Scheme and have already paid 50% of this to the plaintiff.

(iv) At para. 12 of the defendant's amended defence and counter-claim, the defendant has stated that the practice of paying profit commissions was disapproved by Bank Negara in or around 1988 and since then the practice has been discontinued by the insurance industry in Malaysia. At para. 6 of the plaintiff's reply and defence to the counter-claim, the plaintiff admits this and acknowledges that such payments are no longer made.

[9] On the issue of termination of the plaintiff's agency, it was submitted:

(a) That the defendant had issued a notice of termination of agency dated 29 December 1993 addressed to the plaintiff giving the plaintiff five months' notice of the termination of his agency effective as at 30 May 1994. The plaintiff had received notice of this notice of termination. It was further submitted for the defendant's submission that as a result that:

(i) The plaintiff was at all material times, acting as agent for the defendant in respect of the Scheme.

(ii) The defendant was entitled to terminate the plaintiff's agency by giving reasonable notice.

(iii) By the defendant's letter dated 29 December 1993, the plaintiff's agency was terminated with effect from 30 May 1994.

[10] The defendant prayed that: A

(a) The plaintiff's claim be dismissed with costs in favour of the defendant.

(b) The defendant be granted an order-in-terms of prayers (1), (2) and (6) of the amended counter-claim. B

(c) As the defendant's participation on the Scheme for the Bar Council ended with effect from 31 December 2000, it is therefore no longer necessary for the defendant to seek an order in terms of prayer (3) of the amended counter-claim. C

[11] Then the parties had on 23 November 2004 agreed that the issues are:

(a) What is the brokerage the plaintiff is entitled to? D

(b) Is the plaintiff an agent of the defendant or a joint-venture partner?

(c) Whether the termination by the defendant effective on 30 May 1994 is valid? E

[12] The following observations would assist to bring the issues into clearer focus. Firstly from the foregoing it is obvious there were much more facts that, if the processes of discovery and interrogatories were used together with some effort at professional consultation between counsels, are in common than what was scarcely set out in the agreed facts. This languorous approach continued in the trial and submissions. For example counsel for the defendant put to the former General Manager of the defendant that Sedgwick UK held 40%. Yet Arfah Abu Bakar (DW2) the Managing Director of the defendant testified the shareholding of the defendant is 60% Antah, 20% Standard Chartered Bank and 20% Sedgwick Group Plc. The court leaves open that issue as it is not necessary for its decision. F G

[13] From the foregoing there is firstly no dispute there was an agreement between the plaintiff and the defendant dated 22 November 1988. Three months and 19 days earlier at the suggestion of Encik Harun Fazil, the then General Manager of the defendant, the plaintiff had agreed to work together with the defendant to present a proposal on a professional indemnity insurance scheme to the Bar Council. The presentation of the H I

A proposal was made by Mr. Harley Lumsden of Sedgwick UK, which held a 40% interest in the defendant and to whom the defendant was required to give a first option for work requiring international placement and technical support. Sometime in August 1989 they were informed of their selection, subject to approval of
B the members of the Bar Council in their Annual General Meeting. Approval was obtained and the Scheme was launched. Between August 1989 until November 1993 the plaintiff received a total of RM529,929.93. Sometime in 1994 the defendant issued a notice to terminate the agency with the plaintiff effective 30 May 1994.

C

[14] A party can be an agent of a principal regardless whether he is an employee or not. A party can receive payment, whether termed commission or otherwise, if there is a contract that he is entitled to such sum. Whether the plaintiff was an agent,
D independent contractor or even employee is not entirely germane. There is in this case a contract between the plaintiff and the defendant, and it is in writing. The essence of a contract is that the agreement must be made by the free consent of parties competent to contract, for a lawful consideration and with a lawful
E object, and are not expressly declared under the Contracts Act 1950 to be void. There is no issue that this was not the case. The contract was offered in writing by the General Manager of the defendant, with an invitation to the plaintiff to sign on the copy to signify acceptance.

F

[15] The furthest counsel went on actions of the General Manager is that it was "interesting" to note that Encik Harun Fazil (PW2) saw it fit to give away half their profit on a scheme without first seeking the approval of the Managing Director or the
G Board of Directors, and that he has admitted that he neither sought their approval nor informed them of his offer to the plaintiff until after the letter of 22 November 1988 was signed. PW2 was the General Manager of the defendant at the material time. The plaintiff is entitled to invoke the rule in *Turquand*'s case which
H protects third parties dealing with a company. *Tan Ah Tong v. Perwira Habib Bank Malaysia Bhd* [1988] 3 CLJ 833 CA illustrates the principle.

[16] A general manager would ordinarily have ostensible authority to conduct business of his company. The General Manager
I testified for the plaintiff. The defendant failed to advance any evidence or to obtain any concession from him that he did not have such authority.

[17] The agreement is, therefore, a valid contract between the plaintiff and the defendant. This is not an issue between the parties.

[18] Section 38 specifically provides that the parties to a contract must either perform, or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act, or of any other law. There was no earlier complaint that he had not performed his bargain. In fact the plaintiff had been paid commissions for his efforts.

[19] The issue between the parties is, what is the commission the plaintiff is entitled to and until when. The intention of the parties to the agreement can and must be gathered from within the four corners of the agreement. The plaintiff's role and function was set out in the agreement, and until this civil suit was commenced, there had been no previous complaint that he did not perform his end of the bargain. Commissions had been paid to him, and the issue is the quantum payable to the plaintiff.

Findings

What Is The Brokerage That The Plaintiff Is Entitled To Under The Agreement?

[20] The agreement is in the form of a letter from the defendant to the plaintiff concluding with "Please sign the duplicate copy of this letter as your agreement to the above terms and conditions." It is not disputed that the plaintiff had so signed.

[21] The letter was entitled "Contract Of Service On Malaysian Bar Council Professional Indemnity Insurance Scheme".

[22] The plaintiff's role was set out in para. 1 as follows:

Roles and Functions

(a) You will act as an intermediary or co-ordinator between ASC and the members of the Malaysian Bar Council (MBC) in procuring business, servicing and collecting premiums.

(b) You are allowed to utilise the office facilities such as telephone, facsimile, telex, stationery and clerical backing pertaining to the above business from 8.30am to 7pm from Monday to Friday, except if the public holidays fall on working days.

[23] That the plaintiff had played his role was acknowledged by the defendant. The Scheme for the Bar Council involved an area in which the defendant has not shown it had experience of its own, and thus required the local expertise and input provided by the plaintiff, particularly to enable Mr. Harley Lumsden of Sedgwick UK to make a proposal at such a late stage when at the time, according to the defendant's then General Manager, the Bar Council sub-committee was at the stage of reaching a decision on the Citicorp proposal. Indeed their proposal to the Bar Council acknowledged the plaintiff as one of the 4 personnel alongside the General Manager, Mr. Harley Lumsden and one Mr. Jeff Tan.

[24] Paragraph 2 (a) of the agreement states unequivocally:

> **Commission**
>
> You will be remunerated the following commission terms:
>
> (a) 50% of the brokerage earned for each and every case.
>
> (b) 50% of the profit commission payable under the scheme, based on the formula approved by PIAM under Fire ICA.

[25] The plaintiff is clearly entitled under para. 2 to 50% of the "brokerage earned". This is not the same as brokerage earned by the defendant alone, but the brokerage earned by the plaintiff and the defendant working together under the agreement. It is an agreed fact that the common objective of the plaintiff and the defendant was to secure the Scheme in the name of the defendant with mutual financial benefit to both parties. This is acknowledged by the then General Manager of the defendant. Indeed the agreement began:

> Pursuant to our discussion on the above matter, we append hereunder the terms and conditions of your contract for service with Antah Sedgwick Chartered Insurance Brokers Sdn Bhd pertaining to the handling of the above scheme.

[26] Antah Sedgwick Chartered Insurance Brokers Sdn Bhd is the defendant. Since what is earned is 20%, the plaintiff ought on the face of it to be entitled to half of it. The defendant's own letter of 6 November 1992 showed they accepted that the plaintiff was entitled to half of the brokerage, and had been paid the plaintiff 50% of the defendant's brokerage:

> We can advise that Sedgwick after discussions with London underwriters have been able to obtain a 20% commission of premiums for the managers of the scheme. In line with acceptable market practise between our company and Sedgwick trading offices which in this case is Sedgwick Non-Marine, they take 50% of this commission which leaves us physically with a total of 10% commission (of premiums). We have since been paying your 50% of this 10%. You are aware of Sedgwick's input in finalising and managing the scheme and if required, will list "their responsibilities for your records. We have noted your disagreement on this citing our letter Ref. 109L/HF/ik/88 dated 22nd November 1988 and we have had numerous discussions on this issue including meeting the signatory of the said letter.

[27] It becomes obvious that in actual fact a brokerage commission of 20% of premiums paid was obtained, but the defendant had first paid half of that to Sedgwick UK and of the balance half, paid a half of that to the plaintiff. The plaintiff submitted this is a clear breach of contract on the part of the defendant. The defendant tried to explain this away by saying that the plaintiff knew that Mr. Harley Lumsden would be responsible for submission and presentation of the Proposal to the Bar Council and therefore the plaintiff ought to be aware that the defendant would be paying a part of the brokerage commission earned to Sedgwick UK. The defendant also pleaded at para. 14 of defence there was an implied term that the brokerage commission to be paid by the defendant to the plaintiff would be 50% of the brokerage commission after remittance to Sedgwick. The court notes that in relation to the implied term, there was nothing established to show how the implied term arises from the agreement.

[28] The crux of the matter then is whether on the brokerage earnings of 20% of the premiums, should Sedgwick Non Marine be entitled to half of the 20% first, or half of what is earned by the defendant after first paying half of the 20% brokerage earned to the plaintiff.

[29] Bearing in mind that Mr. Harley Lumsden of Sedgwick UK together with the plaintiff met with Dato' Peter Mooney of the Bar Council on 9 August 1988, one would expect that if Sedgwick UK were intended to be entitled to a share of the brokerage earned, it would have been set out in the agreement which was entered into on 22 November 1988 with the plaintiff.

[30] The defendant's association with Sedgwick UK is obvious from its name. That Sedgwick UK had 40% was not disputed. However upon reflection, that the defendant was required to give Sedgwick UK a first option if the defendant were involved in work that required international placement and technical support is an internal arrangement of the defendant. As a 40% shareholder Sedgwick UK would receive 40% of dividends from profits of the defendant.

[31] Both Sedgwick UK and the plaintiff were brought into the transaction by the defendant, who is the only party licensed as a broker. The defendant by the agreement made a bargain with the plaintiff. On its own the agreement seems to suggest a bargain that is very generous to the plaintiff. But taking into account that the proposal was an eleventh hour proposal, and depended for local input from the plaintiff, the following evidence of the then General Manager of the plaintiff who appointed the plaintiff explains why that bargain was offered:

> I was the General Manager of the Defendant and responsible for marketing and business development, to put it plainly to bring in business. The Plaintiff was the one who opened the door to the MBC scheme for the Defendant. In this respect I would say the Plaintiff was a partner in business as he and the Defendant had the common objective of securing the scheme in the name of the Defendant with mutual financial benefits to both parties. Mr. Harley Lumsden was a consultant in Sedgwick Group base in London. Sedgwick Group is a shareholder in the Defendant. He provided technical expertise to the Defendant in formulating the proposal to the MBC.

[32] When asked to explain the agreement, he replied:

> As the General Manager of the Defendant it was my job, function and authority to make any business dealing I deem fit for the Defendant and I drafted the said letter. This letter set out the business arrangement between the Plaintiff and the Defendant. Besides protecting the financial interest of both parties, this letter also defined the Plaintiff's role as an intermediary and co-ordinator, this would facilitate him in representing the Defendant in meetings and in matters pertaining to the proposed scheme.

[33] It would be wrong not to acknowledge that Sedgwick UK would expect to earn any commission for its efforts. The plaintiff had not at any stage denied the efforts of Mr. Harley Lumsden. But since it was understood by the Malaysian Bar Council that

the defendant as the licensed broker in the transaction would administer the Scheme, the defendant is estopped from asserting that Sedgwick UK was doing so for any part of the Scheme.

[34] Any bargain made by the defendant with Sedgwick UK is its own decision and cannot be interfered with by the plaintiff. Indeed commissions on reinsurance is an obvious area where Sedgwick UK providing the foreign work can be amply compensated for its efforts even if it collects no share of brokerage commission from the defendant. In plain language the brokerage earned from the Scheme was a cake for the defendant to cut. But after having cut out the half share for the plaintiff under the agreement without specifying that a half share of the brokerage earned is first to be taken out to pay Sedgwick UK, the defendant can only afterwards cut out a share to Sedgwick UK out of the remaining half, and cannot say there is a half of the plaintiff's slice that must also be shared with Sedgwick UK. The agreement is very clear. Even if matters outside of the agreement are taken into consideration in order to say that as a result there is "ambiguity" in the agreement, it must be borne in mind that since the agreement was drafted by the defendant, any ambiguity is to be resolved in favour of the other party, in this case, the plaintiff.

[35] Paragraph 2(a) used the term "brokerage earned". As pleaded in the defence and not disputed by the plaintiff, commission to the plaintiff was only for the business written and would be dependent on the premium being paid by or collected from the insured. Upon the information by the defendant that they were able to obtain commission of 20% of the premiums, then pursuant to the agreement, half of that 20% would be due to the plaintiff. This 20% figure also appears in the underwriter's agreement from Sedgwick Non Marine Ltd that stated the brokerage earned by the defendant is 20%.

[36] In likely excess of exuberance it was submitted for the plaintiff there is no evidence that the defendant had paid a half share of the 20% to Sedgwick UK. I do not find it necessary to deal with that issue since a finding of what the defendant ought to pay under the agreement is adequate to resolve the dispute.

[37] The Federal Court in *Morello Sdn. Bhd. v. Jaques (International) Sdn. Bhd.* [1995] 2 CLJ 23 held that for the purposes of construction of contracts the intention of the parties is the meaning of the words that they have used. Hence the question to be answered, always, is "what is the meaning of what the parties have said" and not "what did the parties mean to say."

[38] The involvement of Sedgwick UK in putting the proposal to the Bar Council was known to the plaintiff. But it is at least equally known to the defendant who then issued the letter of 22 November 1988 that became upon acceptance by the plaintiff, the agreement. Furthermore, when Arfah Abu Bakar (DW2) was challenged to substantiate her assertion that the plaintiff was informed that as a result of the involvement of Sedgwick UK, a half of the brokerage received would be paid to Sedgwick UK, and the plaintiff is only entitled to a half of the remaining half, she was unable to do so. Nor was this suggestion successfully put to the then General Manager of the defendant who had testified for the plaintiff. In any case, from her own testimony, knowledge of Arfah Abu Bakar was limited as she was not directly involved with the plaintiff, and the details were handled by the General Manager. Hence the result of the defendant's actions, keeping in mind the sequence of events, is that even if there was any intention that Sedgwick UK is to have a share, it must be out of the remaining half share after payment to the plaintiff of his half share under the agreement.

[39] From the foregoing and on the authority above, the court concludes that the agreement expresses clearly the intention of the parties thereto, as drafted by the defendant, that the plaintiff be paid half of the brokerage earned by that joint enterprise of the proposal to the Bar Council.

Is The Plaintiff An Agent Of The Defendant Or A Joint Venture Partner?

[40] Since the terms of payment under the agreement are clear, the question whether the plaintiff is an agent or a joint-venture partner is irrelevant.

Whether The Termination By The Defendant Effective On 30 May 1994 Is Valid?

[41] Since para. 6(b) of the agreement provides that "Commission will continue to be payable on risks renewed with the company if the scheme is terminated due to any reasons or whatsoever", the issue of termination is irrelevant. The plaintiff would continue to be entitled to receive his half share of the brokerage.

[42] It is an agreed fact that the plaintiff had between August 1988 to November 1993 received RM529,929.93 and that represented 5% only of the premiums. Since the plaintiff is entitled to 10% of the premiums, the defendant must pay to the plaintiff another RM529,929.93 for that period. Needless to say the same percentage of 10% will apply thereafter until 2000 when the Scheme was terminated by Malaysian Bar Council.

[43] Further, pursuant to para. 6 of the agreement, the plaintiff is entitled to other classes of insurance from members of the Bar Council and also on risks renewed with the defendant after termination of the Scheme and judgment is entered accordingly.

[44] For reasons above, the defendant's counter-claim was dismissed with costs and the plaintiff's claim allowed with costs.